UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Woodrow W. STUMES R25298

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2391

Woodrow W. STUMES

This appeal has been taken in accordance with 46 U.S.C. 7702(b) and 46 CFR 5.30-1.

By order dated 9 January l984, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's seamen's license and document for a period of six months upon finding proved the charge of misconduct. The specification found proved alleges that while serving as Radio Electronic Officer aboard the S/S VELMA LYKES under authority of the captioned documents, Appellant did, on or about 2 April 1983, while said vessel was in the port of Alexandria, Egypt, wrongfully assault and batter by hitting with fists the Master of said vessel.

The hearing was held at Houston, Texas, on 9 November, 5 and 14 December 1983.

At the hearing Appellant, although not present, was represented by professional counsel who entered a plea of not guilty on his behalf.

The Investigating Officer introduced in evidence the testimony of one witness and eight exhibits.

In defense, Appellant's counsel cross-examined the Coast Guard witness, made motions and made an argument on behalf of Appellant.

Following the hearing, the Administrative Law Judge rendered a written Decision and Order in which he concluded that the charge and specification had been proved and in which he suspended Appellant's license and document outright for a period of six months.

The Decision and Order was served on 11 January 1984. Appeal was timely filed on 6 February 1984 and perfected on 30 November 1984.

FINDINGS OF FACT

At all relevant times, and specifically on or about 2 April 1983, Appellant was serving under authority of his license and document as Radio Electronic Office aboard the S/S VELMA LYKES. At that time the vessel was anchored or moored in or near the port of Alexandria, Egypt, and had been there for approximately 38 days. While the vessel was in Egypt, the Master would sometimes chat with american and British merchant marine officers on other vessels by radio. He did this about 1000 and 1500 during the vessel's coffee break. He did not consider this time to be overtime or penalty pay time to the radio officer. Appellant, however, apparently believed that he should receive overtime pay for these period's during which the Master used the radio.

Shortly after 1100 on 2 April 1983, Appellant and the Master got into a heated discussion and then a loud argument over overtime claims submitted by Appellant. During the argument Appellant and the Master were standing within each other's arms reach, approximately two to three feet apart. They were shouting at each other and calling each other names. The Master noticed or perceived that Appellant was raising his arm to punch him. The Master warded off the blow with his left arm and simultaneously punched Appellant with with his right hand. Appellant fell back and down. The Master remained in the room but did not attempt to strike Appellant again. Appellant immediately got up and charged into the Master and started punching. The Master defended himself and they punched each other for a few seconds. Suddenly Appellant noticed that he was bleeding from a slight cut above his eye. He stepped back and said to the Master "Now, look what you have done" and they stopped fighting.

When the Master saw that Appellant had calmed down, he picked up the overtime sheets they had been discussing and left the room. Neither of them requested medical treatment. The Master made an official log entry in the vessel's logbook regarding the incident and discharged Appellant in the port of Alexandria, Egypt, to the ship's and Lykes Brothers' local agent.

BASES OF APPEAL

This appeal is taken from the order of the Administrative Law Judge. Appellant urges that:

1. The Administrative Law Judge erred in failing to grant Appellant a change of venue from Houston, Texas to Seattle, Washington.

2. The Administrative Law Judge erred in failing to find that Appellant was justified in retaliating to an attack by the Master.

3. The order imposed by the Administrative Law Judge is too harsh.

APPEARANCE: Shane C. Carew, Esq., of Moriarty, Mikkelborg, Broz, Wells and Fryer, Seattle, Washington.

OPINION

I

Appellant asserts that the Administrative Law Judge erred in failing to grant a change of venue from Houston Texas, to Seattle, Washington. I do not agree.

In support of this assertion, Appellant argues that he was unavailable to attend the hearing in Houston because he had to return to his home in Seattle and attend to his sick wife. Second, he argues that the Coast Guard agreed to not oppose the change of venue in return for his agreement to not oppose taking the testimony of the Master in Houston.

Appellant's first argument overlooks the fact that Appellant was properly served with the charge and specification in Houston, Texas, and that the Master of the vessel, the Government's witness, was also in Houston, and could not have been subpoenaed in Houston to appear in Seattle. Appellant's second argument ignores the fact that once the charge and specification had been served, it was for the Administrative Law Judge to determine whether the hearing would proceed on the scheduled date, with or without the individual charged, and whether or not a change of venue would be permitted. Appellant's counsel had no authority to prevent the hearing from going forward as scheduled, nor did the Investigating Officer have authority to grant a change of venue. I note that Appellant's contention was before the

Administrative Law Judge for his consideration in determining whether or not to grant the chage of venue.

Had the change of venuebeen granted, the finder of fact in Seattle may well have jad to rely on a transcript opf the master's testimony rather than seeing him testify in person. Since the Master was the only individual, other than Appellant, actually present who was the events in question, and since the credibility of his testimony was in issue, his demeanor while testifying was of critical importance. Appellant does not represent that the Master was willing to proceed to Seattle voluntarily.

Although, not directly relevant to the question of whether the change of venue was properly denied, I note that the Administrative Law Judge offered Appellant the opportunity to testify by deposition or video tape deposition should he choose not to appear in person.

I am unable to find that the Administrative Law Judge abused his discretion in refusing the change of venue since Appellant was properly served with the charge and specification in Houston and the change of venue to Seattle could well have prevented the trier of fact from personally observing the demeanor of a critical witness whose credibility was in issue. Under 46 CFR 5.20-10 the Administrative Law Judge is given authority to grant a change of venue for good cause shown on the record. In making his determination he must consider not only the rights of the person charged to a fair and impartial hearing, butr also the future availability of witnesses. See also Appeal Decision 2166 (BOLDS AND BROOKS). The Administrative Law Judge's denial of the motion for chage of venue was consistent with these requirements.

II

Appellant next asserts that he was justified in retaliating against the Master. I do not agree.

In support of his position, Appellant argues that the Master's actions in striking him and failing to retreat after he was down were unjustified, and that because of his larger size, the Master should not have used force to repel Appellant's attack. In addition, Appellant argues that he was legally entitled to retaliate for the Master striking him.

Whether or not Appellant's motion, perceived by the Master to be

an attempt to strike him, was in fact an assault is a question of fact to be resolved by the Administrative Law Judge. Since his determination has support in the testimony of the Master, it is not inherently unreasonable or arbitrary and will not be overturned. See Appeal Decisions 2368 (EASTMAN), 2367 (SPENCER), 2356 (FOSTER), 2302 (FRAPPIER) and 2290 (DUGGINS).

Following the initial brief encounter, Appellant was down and the Master had broken off the encounter. Appellant could no longer reasonably believe he was in immediate danger of physical harm. As a result he may not claim that his further action in attacking the Master by repeatedly striking him with his fists was justified by self defense. See Appeal Decision 2193 (WATSON) and Commandant v. Dieban, NTSB Order EM-82 (1980). Self defense may ustify an assault and battery only when the act was defensive, not retaliatory. "If a person defending himself pursues his assailant after the latter has given up the attack", as in the instant case, the former is now liable for assault and battery. Commandant v. Deiban, supra.

For the above reasons Appellant's contention that his assault on the Master was justified are without legal merit.

Appellant's further contention that the actions of the Master during the course of the altercation were unjustified is not relevant to this proceeding. We are concerned here only with the actions of the Appellant in the circumstances under which he found himself. Whether or not the Master may also have been guilty of misconduct is relevant only to the extent that it disproves Appellant's misconduct. As discussed above, it does not.

III

Appellant further asserts that the order entered by the Administrative Law Judge is unduly severe. I do not agree.

The Administrative Law Judge is expected to make a fair and impartial adjudication of each case on its individual fats an d merits. 46 CFR 5.20-165. Appellant's contention that the sanction imposed represents the maximum shown for his offense under the Scale of Average Orders, 46 CFR Table 5.20-165, is not cause to set aside the order of the Administrative Law Judge. Unless clearly excessive, I will not modify the sancton imposed by an Administrative Law Judge.

The sanction of six months suspension for physical assault upon the Master of a vessel is not clearly excessive. Therefore, the order

of the Administrative Law Judge will not be disturbed.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas, on 9 January 1984 is AFFIRMED.

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B.L. STABILE
Vice Admiral, U.S. Coast Guard
Vice Commandant

signed at Washington, D.C. this 13th day of June, 1985.

***** END OF DECISION NO. 2391 *****